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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 MATT STRONG,

12 Plaintiff,

13 vs.

14 WALGREEN CO., et al.,

15 Defendant.

CASE NO. 09cv611 WQH (BLM)

ORDER

16 HAYES, Judge:

17 The matter before the Court is Plaintiff's Motion for Summary Judgment or Partial  
18 Summary Judgment, in the Alternative (Doc. # 12).

19 **BACKGROUND**

20 Plaintiff Matthew Strong filed a complaint on March 3, 2009 against Defendants  
21 Walgreen Co., doing business as Walgreens ("Walgreens") and Rudolf Bragg, Trustee of the  
22 Bragg Family Trust (collectively "Defendants") (Doc. # 1). Plaintiff alleges Defendants  
23 violated the Americans with Disabilities Act ("ADA"), the California Disabled Persons Act,  
24 the California Unruh Act, and the California Health and Safety Code (Doc. # 1). Plaintiff  
25 alleges that the Walgreens store located at 215 North 2nd Street in El Cajon, California, 92021  
26 is a public sales or retail establishment which was not fully accessible to him because of  
27 "architectural barriers" (Docs. # 1 at 2 and 12-5 at 2-3). The alleged barriers include: (1) the  
28 lack of a marked crossing in the parking lot; (2) incorrect signs in the van accessible parking

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4 space; (3) sloped surfaces in the parking lot exceeding 2%; (4) the lack of “detectable  
5 warnings” in the form of a “grooved border” on a ramp; (5) the lack of designated checkstands  
6 for the handicapped open at all times; (6) a restroom door which does not self-close; (7) a toilet  
7 paper dispenser which “protrudes into the clear maneuvering space needed to access the water  
8 closet;” (8) sharp edges on the toilet paper dispenser; (9) the fact that the front roll of toilet  
9 paper was more than twelve inches from the “water closet;” (10) lack of access to the  
10 disposable seat cover dispenser in the bathroom; (11) improperly or incompletely wrapped  
11 pipes in the bathroom; and (12) “insufficient strike side clearance on the pull side of the  
12 restroom door.” (Docs. # 1 at 3-4 and Doc. # 12-5 at 2-3).<sup>1</sup>

13 Plaintiff claims that each of these alleged deficiencies violates the ADA, the California  
14 Disabled Persons Act, the California Unruh Act, and the California Health and Safety Code  
15 (Doc. # 1). Plaintiff seeks (1) injunctive relief, declaratory relief, attorney’s fees, costs, and  
16 legal expenses pursuant to the ADA; (2) statutory minimum damages of \$1,000, declaratory  
17 relief, attorney’s fees, and an injunction barring Walgreens from violating California law  
18 pursuant to the California Disabled Persons Act; (3) statutory minimum damages of \$4,000 for  
19 each offense and attorney’s fees and costs pursuant to the California Unruh Act; and (4)  
20 injunctive relief and attorney’s fees pursuant to the California Health and Safety Code. On  
21 August 7, 2009, Plaintiff filed a Motion for Summary Judgment or Partial Summary Judgment  
22 in the Alternative (Doc. # 12).

### 23 **CONTENTIONS OF THE PARTIES**

24 Plaintiff moves for summary judgment, or in the alternative partial summary judgment  
25 (Doc. # 12). In support of the motion, Plaintiff filed his own declaration, restating the factual  
26 allegations of his complaint (Doc. # 12-5). Defendants claim that Plaintiff’s proffered

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28 <sup>1</sup>Plaintiff’s complaint also contained a claim about “the lack of a white outline around  
handicapped parking spaces” (Doc. # 1). Plaintiff did not discuss the claim in his motion or offer any  
evidence to support it, therefore, the Court will not address it. See Docs. # 1, 12.

evidence fails to make even a *prima facie* case because it fails to explain how Plaintiff has personal knowledge of the violations he alleges (Doc. # 14 at 5, 7). Defendant filed the declaration of an expert witness, Kim Blackseth, which disputes Plaintiff's factual allegations, disputes whether Plaintiff's allegations constitute violations of state or federal law, and states that Plaintiff does not have standing to bring two of his claims because the alleged violations would not affect someone with Plaintiff's disability (Doc. # 14-4). Defendants ask the Court to *sua sponte* grant summary judgment in favor of Defendants (Doc. # 14 at 15). In his reply, Plaintiff concedes that there are issues of material fact as to several alleged violations, specifically the availability of a handicapped-accessible checkstand, the toilet paper dispenser which "protrudes into the clear maneuvering space needed to access the water closet" and has sharp edges, and whether there is sufficient "strike side clearance on the pull-side of the restroom door" (Doc. # 16).

### FACTS

Plaintiff is a 49 year-old man who is a C-5 quadriplegic who is unable to walk or stand (Doc. # 12-5 at 2). Plaintiff uses a wheelchair "when traveling in public" (Doc. # 12-5 at 2). Defendants own the Walgreens located at 215 North 2nd Street in El Cajon, California, 92021 (Docs. # 12-4 at 2, 14-2 at 2). Plaintiff visited the Walgreens store in question repeatedly, including on February 22, 2009, March 1, 2009, and on one other occasion in March of 2009 (Doc. # 12-5 at 2). Plaintiff states that during these visits, he encountered "architectural barriers that denied [him] full and equal access" to Defendants' facilities (Doc. # 12-5 at 2). Plaintiff states:

- a) There was no marked crossing where the accessible route crossed the vehicular way.
- b) The signage posted at the van accessible parking space was incorrect.
- c) The slopes and cross slopes of the disabled parking spaces to the north side of the Store exceeded 2.0%.
- d) The slopes and cross slopes of the access aisle(s) to the north side of the Store exceeded 2.0%.
- e) The grooved border was located on the ramp, instead of on the level

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4 surface at the top of the ramp.  
5 f) There were no checkstands designated as being accessible to the  
6 disable[d] and open at all times for persons with disabilities.  
7 g) The restroom door was not self-closing.  
8 h) The toilet tissue dispenser protruded into the clear maneuvering space  
9 needed to access the water closet.  
10 i) The toilet tissue dispenser contained sharp edges.  
11 j) The front roll of toilet paper in the dispenser was located more than  
12 twelve inches from the front of the water closet.  
13 k) The water closet was an obstruction to the use of the disposable seat  
14 cover dispenser.  
15 l) The pipes underneath the lavatory were incompletely wrapped.  
16 m) There was insufficient strike side clearance on the pull-side of the  
17 restroom door.

18 (Doc. # 12-5 at 2-3).

19 Defendants hired Kim Blackseth, who is “an expert in the field of disabled access” to  
20 examine the store (Doc. # 14). Blackseth has been a consultant to “businesses, government,  
21 architects, and developers” for eighteen years as president of Kim. R Blackseth Interests, Inc.  
22 (Doc. # 14-4 at 1). Blackseth has testified in numerous disabled access cases, is licensed by  
23 the State of California as a “Certified Access Specialist,” and was named by the Governor of  
24 California to the California Building Standards Commission and the California Board of  
25 Professional Engineer and Land Surveyors (Doc. # 14-4 at 1-2).

26 Blackseth’s examination of the store revealed two defects, the lack of a sign at the  
27 handicapped accessible checkstand and the position of the toilet seat cover dispenser, which  
28 she advised Walgreens to correct (Doc. #14-4 at 2-3). Blackseth states that Walgreens did so  
(Doc. # 14-4 at 4-5). Blackseth concluded that (1) the lack of a marked crossing “where the  
accessible route crosses the vehicular way” was not a violation of the ADA Accessibility  
Guidelines (“ADAAG”) or the California Building Code (“CBC”) and “does not constitute a  
barrier to access; (2) that the sign in the van accessible handicapped parking space was correct;  
(3) that the slope in the parking lot does exceed 2.0% in some places, but is within industry  
tolerances as permitted by the ADA and California law; (4) that Plaintiff lacks standing to raise  
a claim as to the “grooved border” of the ramp because he is not visually impaired; (5) that the

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4 store does have a handicapped-accessible checkstand which is always open, and although it  
5 lacked the proper sign, the lack of a sign “did not constitute a barrier to access;” (6) that neither  
6 the ADA nor California law requires the restroom door to be self-closing; (7) that the toilet  
7 paper dispenser does not “encroach into the required 60" x 48" clear floor area” in the  
8 bathroom stall; (8) that there are no sharp edges on the toilet paper dispenser; (9) that the toilet  
9 paper roll is correctly positioned; (10) that the previous misplacement of the toilet seat cover  
10 dispenser was not an obstruction to Plaintiff’s access because he cannot “independently  
11 transfer” his body to the toilet, and thus does not need seat covers; (11) that the pipes in the  
12 bathroom were properly wrapped; and (12) that there is 18" of “pull strike side” clearance in  
13 the restroom, which is sufficient under state and federal law (Doc. # 14-4 at 3-5).

#### 14 **LEGAL STANDARD**

15 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil  
16 Procedure where the moving party demonstrates the absence of a genuine issue of material fact  
17 and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp.*  
18 *v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive  
19 law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
20 248 (1986). A dispute over a material fact is genuine if “the evidence is such that a reasonable  
21 jury could return a verdict for the nonmoving party.” *Id.*

22 A party seeking summary judgment always bears the initial burden of establishing the  
23 absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. If the moving party  
24 satisfies its initial burden, the nonmoving party must “go beyond the pleadings and by her own  
25 affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate  
26 specific facts showing that there is a genuine issue for trial.” *Id.* at 324 (quoting Fed. R. Civ.  
27 P. 56(e)).

28 In ruling on a motion for summary judgment, the Court must view all inferences drawn

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4 from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*  
5 *Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “Credibility  
6 determinations [and] the weighing of evidence . . . are jury functions, not those of a judge,  
7 [when] he is ruling on a motion for summary judgment.” *Anderson*, 477 U.S. at 255.

### 8 **DISCUSSION**

9 Plaintiff must show that (1) he is disabled; (2) that Defendants own, lease, or operate  
10 a “public accommodation;” and (3) he was denied full and equal treatment because of his  
11 disability. *See Molski v. M.J. Cable*, 481 F.3d 724, 730 (9th Cir. 2007). For the purposes of  
12 the summary judgment motion, Defendants do not dispute that Plaintiff is disabled within the  
13 meaning of the ADA and California law (Doc. # 14-2 at 1) or that Walgreens is a “public  
14 accommodation” owned by Defendants (Doc. 14-2 at 2). Therefore, the issue before this Court  
15 as to Plaintiff’s motion for summary judgment is whether Plaintiff has established that there  
16 is no genuine dispute of material fact that defects in Defendants’ store denied Plaintiff full and  
17 equal treatment. As to each of the claimed defects at issue, Plaintiff has failed to carry this  
18 burden.

19 Plaintiff’s first claim, that there is no marked crossing where the accessible route from  
20 the handicapped parking area to the store crosses the path of traffic, is factually undisputed  
21 (Doc. # 14-2 at 2). However, Plaintiff does not cite any statute, regulation, or case law  
22 establishing that this alleged deficiency is a violation of the relevant statutes. Instead, Plaintiff  
23 offers a citation to a U.S. Department of Justice Publication entitled *Americans with*  
24 *Disabilities Act: Technical Assistance Updates from the U.S. Department of Justice, Common*  
25 *Questions: Readily Achievable Barrier Removal, Van Accessible Parking Spaces*, available as  
26 a PDF at <http://www.ada.gov/publicat.htm>. However, this publication explicitly states that  
27 it is not a legal interpretation of the ADA. *Id.* at 1. Defendants offer the their expert’s  
28 statement that nothing in the applicable laws requires Defendants “mark the provided path of

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4 travel” and that the parking lot is compliant with both state and federal law (Doc. # 14-4 at 3).  
5 Plaintiff has failed to establish a violation of any state or federal law.

6 Plaintiff’s second claim, that there is incorrect signage posted at the handicapped van  
7 accessible parking space, is factually disputed by Defendants (Doc. # 14-2 at 2). Defendants’  
8 expert states that the required “Van Accessible” sign is adequate and correctly placed in the  
9 handicapped van accessible parking space (Doc. # 14-4 at 3). Plaintiff’s own statement  
10 describing this alleged defect is conclusory and provides no indication of how the sign is  
11 incorrect or even what the sign says (Doc. # 12-5). Plaintiff offers no other evidence to support  
12 his claim. Plaintiff has therefore failed to establish that there is no genuine issue of material  
13 fact as to whether the sign violates state or federal law.

14 Plaintiff’s third claim, that the slope of the parking lot exceeds 2.0% in some places, is  
15 not factually disputed, but the parties disagree about whether such a slope violates the relevant  
16 state and federal law (Docs. # 14-2 at 2, 16 at 6). Defendants’ expert states that the slope  
17 slightly exceeds 2.0%, but is within the permitted deviations based on industry standards and  
18 that paving with concrete or asphalt is “not [a] precision trade[.]”(Doc. # 14-4 at 3). *See also*  
19 *Lonberg v. City of Riverside*, No. 97-0237, slip op. at 9-10 (C.D. Cal. May 16, 2007) (holding  
20 a 1.0% deviation from the prescribed slope was within industry tolerances and did not violate  
21 the ADA), *reversed on other grounds*, 517 F.3d 846 (9th Cir. 2009). Plaintiff asserts that the  
22 slope exceeds the industry tolerance and cites to a report published by the American Concrete  
23 Institute Committee as evidence (Doc. # 16 at 6). The parties have produced competing  
24 evidence as to whether the parking lot slope constitutes a barrier to disabled access; therefore  
25 summary judgment cannot be granted because evaluating these competing claims would  
26 require credibility determinations and weighing of the evidence that are inappropriate at this  
27 stage in the proceedings.

28 Plaintiff’s fourth claim, that the ramp lacks the appropriate “grooved border,” is



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4 disputed by Defendants on standing grounds (Doc. # 14-2 at 3). Defendants' expert states that  
5 a grooved border on ramps is for the benefit of people who are visually impaired (Doc. # 14-4  
6 at 4). Plaintiff does not allege that he is visually impaired. Because Defendant has introduced  
7 evidence that the alleged defect would not affect someone with Plaintiff's disability, Plaintiff  
8 has failed to establish that there is no genuine issue of material fact as to whether he was  
9 denied full and equal treatment because of his disability.

10 Plaintiff has conceded that there is a genuine issue of material fact as to his fifth claim,  
11 which relates to the availability of a handicapped accessible checkstand (Doc. # 16 at 10).

12 Plaintiff's sixth claim, that the restroom door is not self-closing, is factually disputed  
13 by Defendants (Doc. # 14-2 at 3). Defendants' expert also states that the lack of a self-closing  
14 restroom door would not violate any applicable law (Doc. # 14-4 at 4). In his reply, Plaintiff  
15 concedes that whether a non-self-closing restroom door constitutes a violation of the applicable  
16 laws is "an open question of ADA law" (Doc. # 16 at 8). Plaintiff's declaration in support of  
17 summary judgment does not explain how the restroom door being non-self-closing interfered  
18 with his ability to use the restroom. Therefore, Plaintiff has failed to establish that there is no  
19 genuine issue of material fact as to this claim.

20 Plaintiff has conceded that there is a genuine issue of material fact as to his seventh and  
21 eighth claims, which relate to the toilet paper dispenser (Doc. #16 at 10-11).

22 Plaintiff's ninth claim, that the front toilet paper roll is located more than twelve inches  
23 from the front of the water closet, is not factually disputed (Doc. 14 at 7). However,  
24 Defendants claim this is not a violation of any applicable law (Doc. # 14 at 11). Defendants  
25 point out the fact that there are two rolls of toilet tissue, one of which is closer to the water  
26 closet than twelve inches (Doc. # 14-4 at 5). Because there is one fully accessible roll of toilet  
27 paper, Defendants' expert states that it is not a violation of the ADAAG § 4.17.3 which  
28 Plaintiff cites. The guideline requires the toilet paper dispenser to be twelve inches or less



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4 from the water closet, but does not state that the twelve inches must be measured from the front  
5 of the toilet paper dispenser as Plaintiff contends. *See* ADAAG § 4.17.3 and Fig. 30(a).  
6 Plaintiff cites no authority supporting his method of measuring the prescribed twelve inches  
7 and has therefore failed to establish that this claimed defect is a violation of any state or federal  
8 law.

9 Plaintiff's tenth claim, that the water closet is an obstruction to the use of the disposable  
10 seat cover dispenser, is disputed by Defendants on standing grounds (Doc. # 14-2 at 3).  
11 Defendants' expert agreed that the seat cover dispenser was incorrectly located and advised  
12 Defendants to relocate it (Doc. # 14-4 at 5). However, Defendants' expert states that the  
13 location of the seat cover dispenser was not a barrier to access for Plaintiff because C-5  
14 quadriplegics "cannot independently transfer their bodies from their wheelchair to the toilet"  
15 and therefore do not need to use seat covers (Doc. #14-4 at 5). Because Defendant has  
16 introduced evidence that the alleged defect would not affect someone with Plaintiff's disability,  
17 Plaintiff cannot establish that there is no genuine issue of material fact as to whether he was  
18 denied full and equal treatment because of his disability.

19 Plaintiff's eleventh claim, that pipes under the lavatory are improperly wrapped, is  
20 factually disputed by Defendant (Doc. 14-2 at 4). Defendants' expert states that "the required  
21 wrap was provided in the men's restroom" (Doc. 14-4 at 5). Because of the factual dispute,  
22 summary judgment cannot be granted because evaluating the evidence requires credibility  
23 determinations that are inappropriate at this stage in the proceedings.

24 Plaintiff has conceded that there is a genuine issue of material fact as to his twelfth  
25 claim, which alleges that there is insufficient strike side clearance on the pull-side of the  
26 restroom door.

27 Although Defendants did not file a cross-motion for summary judgment, in their  
28 response, they suggested that this Court should enter summary judgment against Plaintiff *sua*

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4 *sponte*. However, the Ninth Circuit has warned that “‘great care must be exercised to assure  
5 that the original movant has had an adequate opportunity to show that there is a genuine issue  
6 and that his opponent is not entitled to judgment as a matter of law.’” Kassbaum v.  
7 Steppenwolf Prods., Inc., 236 F.3d 487, 494-495 (9th Cir. Cal. 2000) (quoting Ramsey v.  
8 Coughlin, 94 F.3d 71, 74 (2d Cir. 1996)); *see also* 10A Charles Alan Wright, Arthur R. Miller  
9 & Mary Kay Kane, Federal Practice and Procedure § 2720 at 34 (2d ed. 1983). Therefore, the  
10 Court declines to exercise its *sua sponte* authority to enter summary judgment against Plaintiff.  
11 Defendants may file a summary judgment motion and if they choose to do so, must file before  
12 February 19, 2011 pursuant to the Magistrate Judge’s scheduling order (Doc. # 11 at 4).

13  
14 **CONCLUSION**

15 **IT IS ORDERED** that Plaintiff’s Motion for Summary Judgment or Partial Summary  
16 Judgment (Doc. # 12) is **DENIED**.

17 DATED: November 3, 2009

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19 **WILLIAM Q. HAYES**  
20 United States District Judge  
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